

fically stated that the period of time stipulated in the rule after the date of the proceeding in an application for leave for *certiorari* runs from the date of the order sought to be removed. The propriety of this construction is reinforced by rule 4 of the new English Order 53 for application for judicial review introduced in 1977 which provides for an application to be made promptly and in any event within three months from the date when grounds for the application first arose and then goes on in sub-rule (2) thereof to define where the relief sought is an order of *certiorari* the date when grounds for the application first arose as the date of the judgment, order, conviction or proceeding.

It is abundantly clear that the date of the proceeding in the matter before us for the purposes of Order 53 rule 1A is *ex visceribus verborum* the date of the Minister's decision set out in Form D, scilicet, November 23, 1981. The very point we have taken was considered and discussed some two months ago in *Griffiths & Anor. v. Secretary of State for the Environment & Anor.*⁽⁵⁾ in which the House of Lords held that when the Secretary of State gave a decision on an appeal under the Town and Country Planning Act, 1971 against a refusal of planning permission, the six weeks provided for in that Act for making an application to the High Court to quash the order on certain limited grounds ran from the date when the decision was made and not from the date when notice of it was received by the aggrieved person and that the decision was made on the date stamped on the decision letter. Lord Bridge of Harwich in his opinion in that case said (at page 188):

"When a letter recording a decision of the Secretary of State made 'hereby' has been typed, signed on behalf of the Secretary of State and date-stamped, it seems to me that the process of decision making is complete and that the letter itself is not the less a decision of the Secretary of State because it is still in his power to revoke it".

The decision of the Minister in the instant appeal is embodied in Form D prescribed in the Industrial Relations Regulations, 1980 which records his decision made 'hereby' and was typed and signed by him and dated November 23, 1981. The process of decision making by the Minister was then complete and his decision was accordingly given on that date – November 23, 1981.

The appellant was as a result without the time prescribed in Order 53 rule 1A and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned Judge within its explicit requirements. Leave should not therefore

have been granted to the appellant to apply for *certiorari* and the learned Judge had no jurisdiction to do so. On this ground we dismissed the appeal before us with costs and directed the deposit lodged in court by way of security to be paid out to the respondents.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Lobo & Associates.*

DIRECTOR-GENERAL OF INLAND REVENUE v. EUROMEDICAL INDUSTRIES LTD.

[F.C. (Wan Suleiman, Abdul Hamid & Mohamed Azmi F.JJ.) October 20, 1982 & April 2, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 17 of 1981]

Revenue Law – Management fees paid to a company resident in United Kingdom with no permanent establishment in Malaysia – Payments within definition of "royalty" in Income Tax Act but not within definition in Double Tax Relief (United Kingdom) Order – Whether payments liable to Tax – Double Tax Relief (United Kingdom) Order, 1973, Articles VI and XI – Income Tax Act, 1967, ss. 2,4 and 132.

In this case the respondents, a company resident in the United Kingdom and with no permanent establishment in Malaysia entered into an agreement with a Malaysian company for the purpose of manufacturing catheters. The respondents were to provide managerial, planning, training, technical, operational, marketing and development services to the Malaysian company. The Malaysian company paid management fees to the respondents. The Director-General of Inland Revenue treated these payments as royalty within the definition of section 2 of the Income Tax Act, 1967, and accordingly made assessments against the respondents under section 4(d) of the Income Tax Act. The respondents appealed. The question for determination by the High Court was whether the assessments were correctly made having regard to the Double Taxation Relief (United Kingdom) Order 1973 and section 4 of the Income Tax Act, 1967. It was common around that the payments were management fees which were paid to a company resident in the United Kingdom with no permanent establishment in Malaysia. It was also agreed that the payments would come within the definition of "royalty" under section 2 of the Act but not within the definition in Clause 3 of Article XI of the Relief Order. Vohrah J. in the High Court decided that the provisions of the Relief Order would override those in the Income Tax Act. He held that the fees should be treated as income or profits and since the respondents did not carry on business in Malaysia through a permanent establishment in Malaysia, there was no legal basis for the Director-General to charge income tax under section 4 of the In-

come Tax Act. The Director-General of Inland Revenue appealed.

Held: the learned trial judge was correct in holding that because the fee did not come within the definition of "royalty" within the definition of that term in the Double Taxation Relief (United Kingdom) Order and that because of section 132(1) of the Income Tax which provides that in the event of conflict, the provisions of the Relief Order shall prevail, the fees should be treated as income or profits and not as royalty and as the respondents did not carry on business through a permanent establishment here, the fees were not liable to tax under section 4 of the Income Tax Act, 1967.

Cases referred to:

- (1) *Ostime (H.M. Inspector of Taxes) v. Australian Mutual Provident Society* 38 T.C. 492, 509.
- (2) *Director-General of Inland Revenue v. Phaltan Sugar Works Ltd.* [1983] 1 M.L.J. 74.

FEDERAL COURT.

Mokhtar bin Haji Sidin (Senior Federal Counsel) for the appellants.

J. Puthuchearay for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The Special Commissioners of Income Tax confirmed the assessment of income tax made under section 4(d) of the Income Tax Act 1967 by the appellant (DGIR) upon the respondent company Euromedical Industries Ltd. (EIL) in respect of certain payments it received from Euromedical Industries Sdn. Bhd. (EISB).

EIL appealed, and the question for determination by the High Court was whether the assessments were correctly made, having regard to the Double Taxation Relief (United Kingdom) Order, 1973 and to section 4(a) of the Act.

EIL was incorporated in the United Kingdom and, for the purposes of Malaysian Income Tax, is resident there and has no permanent establishment in Malaysia. On May 9, 1973 it entered into an agreement with a Malaysian company, Plantations Agencies Sdn. Berhad, (PASB) to set up EISB in Malaysia with its registered office in Penang for the purpose of manufacturing catheters. This agreement (AB-23) provides, *inter alia*, for EIL to appoint three directors to the board of EISB and for these directors and for other EIL employees to provide managerial, planning, training, technical, operational, marketing and development services to EISB. In the result, EISB paid

A to EIL the following amounts as managerial fees:—

Period	Amount
From 1.6.73 to 31.12.73	\$35,217.00
Year ending 31.12.74	56,134.00
Year ending 31.12.75	49,152.00

B DGIR treated these payments as royalties within the definition of section 2 of the Income Tax Act, 1967 and accordingly made assessments on EIL under section 4(d).

C It was common ground that the payments were management fees which were paid to a company resident in the United Kingdom with no permanent establishment in Malaysia. It was also agreed that the payments would come within the definition of "royalty" under section 2 of the Act but not within the definition in Clause 3 of Article XI of the Relief Order.

The learned Judge considered section 132(1) of the Act which reads —

E "If the Minister by statutory order declares that —

(a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view to affording relief from double taxation in relation to tax under this Act and any foreign tax of that territory; and

F (b) it is expedient that those arrangements should have effect,

then, so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act notwithstanding anything in any written law."

G and decided that in the event of a conflict such as that shown in the present instance, the provisions of the Relief Order would override those in the Act.

H It would follow from this line of reasoning that the payment of management fees to EIL is not royalty, but is income for the management services it provides to EISB in compliance with Clause 5 of the Heads of Agreement entered into between EIL and PASB on May 9, 1973 for the establishment of EISB (see Agreement AB-23).

I Article VI Clause 1 of the Relief Order provides —

"1. The income or profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State, unless the enterprise carries on business in the other Contracting State through a permanent establishment

situated therein. If the enterprise carries on business as aforesaid, tax may be imposed in that other Contracting State on the income or profits of the enterprise but only on so much thereof as is attributable to that permanent establishment."

Referring to this Clause, his Lordship went on to say that since the Article XI definition of "royalties" does not apply, then any income of EIL is taxable only in U.K. since it does not carry on business in Malaysia through a permanent establishment here. Since the provision of the Relief Order is unambiguous and applies in this case, he therefore did not consider it appropriate to apply the presumptive provisions of section 15(b) of the Act, and in consequence there was no legal basis for the DGIR to charge income tax under section 4 of the Act.

Counsel for the appellant (Revenue) aver that the only point in dispute is whether, having found that the sum in dispute is royalty within the meaning of section 2 of the Act, the learned Judge could then hold that because the definition of "royalties" in Article XI did not apply, Clause 1 of Article VI would then become applicable and the management fees paid to EIL would therefore be income taxable in the United Kingdom only.

It appears to us that the learned Judge never intended it to be understood that he had found the management fees to be royalty under section 2 of the Act. What he obviously means is that whilst the parties agree that the fee does appear to come under the definition of "royalty" under that section, it does not come within the definition of that term in the Relief Order, and that because under section 132(1) of the Act in the event of conflict the provisions of the Relief Order should prevail, the fees should be treated as income or profit and not as royalty.

The provision is not peculiar to our tax law. Counsel for the respondent drew our attention to a similar provision in the United Kingdom Income Tax Act, 1918 where in the event of any inconsistency between the provision of the Act on the one hand and a Double Taxation Relief Agreement on the other, the Agreement must prevail over the Act – see *Ostime (H.M. Inspector of Taxes) v. Australian Mutual Provident Society*⁽¹⁾.

We were also referred to the decision of this court in *Director-General of Inland Revenue v. Phaltan Sugar Works Ltd.*⁽²⁾ which learned counsel for Revenue submits is on all fours with the pre-

sent appeal and is therefore applicable to the present appeal.

The great difference between these two cases is that in *Phaltan Sugar*, there is no conflict between the definition of "royalty" under the Act and that in the Indian Order, though the definition in the Act is wider in its scope, so that section 132(1) of the Act does not operate.

The *Phaltan Sugar* decision does not therefore assist Revenue.

We would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

KAM GIN PAIK & ORS. v. PEMUNGUT HASIL TANAH DAERAH BARAT DAYA, PULAU PINANG

[O.C.J. (Raja Abdul Aziz Addruse J. C.) January 23 & 24,
February 28, April 8 & November 9, 1981]

[Penang – Originating Motion No. 16 of 1980]

Administrative Law – Application for certiorari – Land Acquisition – Award referred to High Court – Whether bar to proceedings for certiorari – Land Acquisition Act, 1960, ss. 38(5) & 68 – Federal Constitution, Art 13.

In this case the applicants applied for an order of certiorari to quash the decision of the Collector of Land Revenue, Barat Daya, Pulau Pinang for the acquisition of certain land registered in the name of the applicants. One of the grounds raised was that the award ought to be quashed by reason of failure on the part of the Collector to observe the rules of natural justice when conducting his enquiry. A preliminary objection was raised that, as the respondent's award had been referred to the High Court, the proceedings should be stayed until the reference had been disposed of.

Held: (1) the applicants will not be able to obtain the remedy they seek by these proceedings in the reference under section 38(5) of the Land Acquisition Act, 1960. For that reason the application of the respondents to stay the proceedings should be dismissed;

(2) section 68 of the Land Acquisition Act, 1960 which says that no order or award of the Collector made under the Act should be set aside, must be read subject to Article 13 of the Federal Constitution which provides that no person shall be deprived of property save in accordance with law and even then subject to the payment of adequate